



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 5, 2004

Mr. Carey Smith  
General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2004-2714

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#197953.

The Department of Human Services (the "department") received a request for information that reflects findings of substantiated allegations against Vista Care Family Hospice. You state that a portion of the requested information is being provided to the requestor and that a portion of the requested information will be withheld in accordance with a previous determination issued by this office. *See* Open Records Letter No. 2001-5348 (2001) (previous determination for any reports, records, and working papers used or developed during investigations conducted under section 142.009 of the Health and Safety Code, and any identifying information of individuals contained in certain federal forms). You claim that the marked information in the submitted documents is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You claim that certain marked portions of the submitted state form are confidential under section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The department has several lawsuits pending against the Office of the Attorney General over the release of similar information. Furthermore, your

arguments here are similar to your arguments in the files that are now at issue in litigation. Accordingly, we are issuing this letter ruling without a finding regarding the applicability of HIPPA to those portions of the submitted state form and will allow the trial court to resolve the issue of whether records of the type at issue must be released to public requestors.

Further, you claim that certain marked portions of the submitted state form are excepted from disclosure under section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code. Section 142.009(d)(5) provides that “reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except . . . (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency[.]” Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release the submitted state form. However, you claim that “any identifying information of a person contained within the state form, other than that of the investigated agency or its owner, must be redacted prior to the public release of the form.” You inform us that the information you have marked pursuant to section 142.009(d)(5) relates to an agency representative who is not the owner of the agency. After reviewing your arguments and the submitted information, we agree that the identifying information you have marked is confidential under section 142.009(d). *See* Health & Safety Code § 142.001(12) (defining “home and community support services agency”). Therefore, pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code, you must withhold the identifying information that you have marked in the state form.

Next, we address your claim that certain marked portions of the submitted state form are confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act (“MPA”).<sup>1</sup> Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records

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<sup>1</sup>Occ. Code §§ 151.001-165.160

Decision No. 598 (1991). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based on your representations and our review of this particular information, we agree that the portions of the submitted state form you have marked do constitute information taken from medical records and are therefore subject to the MPA. This marked information may be released only in accordance with the MPA.

In summary, we decline to rule on the applicability of HIPPA to portions of the submitted state form at this time. You must withhold the identifying information that you have marked in the state form pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. Additionally, the information taken from medical records that you have marked is subject to the MPA and may be released only in accordance with the MPA. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/lmt

Ref: ID#197953

Enc. Submitted documents

c: Ms. Paula Dodd  
P.O. Box 573  
Red Oak, Texas 75154  
(w/o enclosures)